ECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
APR 21 2016
OFFICE OF THE CLERK

No. 15-577

In the Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* ETHICS & RELIGIOUS LIBERTY COMMISSION IN SUPPORT OF PETITIONER

MICHAEL LEE FRANCISCO
Counsel of Record
MRDLAW
3301 West Clyde Place
Denver, CO 80211
(303) 325–7843
michael.francisco@mrd.law

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The difference between direct and indirect funding cannot save Missouri's targeted exclusion of Trinity Lutheran Church from a neutral and secular aid program. 3

A. The Establishment Clause considerations of direct or indirect funding does not justify excluding religious actors from government aid 5

1. Consideration of direct or indirect funding should be limited to Establishment Clause challenges in the context of education. 5

2. Even for Establishment Clause challenges, breaking the link of direct government funding is not required 9

B. Diminished Establishment Clause concerns from scrap tire playground resurfacing alleviate any need to distinguish direct from indirect aid 10

II. Churches should be allowed to participate in government programs on equal footing with other civic organizations..... 14

CONCLUSION..... 16

TABLE OF AUTHORITIES

Cases

Agostini v. Felton,
521 U.S. 203 (1997) 6, 7, 10

Comm. for Pub. Educ. & Religious Liberty v. Regan,
444 U.S. 646 (1980) 9

Everson v. Bd. of Educ. of Ewing Twp.,
330 U.S. 1 (1947) 16

Hunt v. McNair,
413 U.S. 734 (1973) 10

Lee v. Weisman,
505 U.S. 577 (1992) 15

Locke v. Davey,
540 U.S. 712 (2004) ..... passim

Mitchell v. Helms,
530 U.S. 793 (2000) ..... passim

Mueller v. Allen,
463 U.S. 388 (1983) 7, 8

Roemer v. Bd. of Pub. Works of Md.,
426 U.S. 736 (1976) 10

Sch. Dist. of City of Grand Rapids v. Ball,
473 U.S. 373 (1985) 10

Trinity Lutheran Church of Columbia v. Pauley,
788 F.3d 779 (8th Cir. 2015) 4, 5, 10

Walz v. Tax Comm'n of the City of New York,
397 U.S. 664 (1970) 16

Witters v. Wash. Dept. of Servs. for Blind,
474 U.S. 481 (1986) 7, 8, 12

Zelman v. Simmons–Harris,
536 U.S. 639 (2002) 7, 8, 12, 13

Zobrest v. Catalina Foothills School Dist.,
509 U.S. 1 (1993) 7, 8, 12

Other Authorities

James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) 15

Richard Land, *The Divided States of America* (2011) 15

Constitutional Provisions

Mo. Const. art. I, § 7 11

INTEREST OF AMICUS CURIAE[1]

The Ethics & Religious Liberty Commission ("ERLC") is the public policy and engagement arm of the Southern Baptist Convention. With more than 15 million members and over 46,000 churches nationwide the Southern Baptist Convention is America's largest Protestant denomination. The ERLC is charged with addressing public policy affecting such issues as freedom of speech, religious liberty, marriage and family, the sanctity of human life, and ethics.

Religious freedom is an indispensable, bedrock value for Southern Baptists. The ERLC engages culture with the gospel of Jesus Christ by speaking in the public square for the protection of religious liberty and human flourishing. The correlated guarantee of freedom from government interference in matters of faith protects church members by fostering a society where religious adherents from all faiths may follow the dictates of their conscience in the exercise of religion.

The thousands of churches represented by the ERLC have an interest in not being discriminated against in government aid programs, like the playground resurfacing program in Missouri at issue in this case. For the same reasons Trinity Lutheran

---

[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Their letters of consent are on file with the Clerk. As required by Rule 37.2(a).

Church of Columbia was prevented from receiving a government grant, any given Southern Baptist congregation could likewise be prevented from participating in government programs purely on the basis of religion. The ERLC brings a unique perspective on the impact of religious liberty decisions throughout the nation.

SUMMARY OF ARGUMENT

Americans are appropriately apprehensive about the government becoming entangled with religion. Missouri has a grant program to resurface playgrounds using recycled tires and it categorically excludes churches from participating in the otherwise neutral grant program. Trinity Lutheran's meritorious application was rejected for one reason: it was a church. The scads of cases parsing the Establishment Clause often present difficult line drawing problems for the Court. Despite Missouri's protestation to the contrary, this case can be decided without relying on finer points of Establishment Clause doctrine. Nobody need fear an established church by means of a recycled tire surface on a playground.

As one argument to try and justify the express discrimination against any religious applicant from participating in the scrap tire recycling grant program, Missouri and the Eighth Circuit majority invoke the "direct" nature of the grant funding. The argument seeks refuge in *Locke v. Davey*'s comment about a break in the link of government funding for Establishment Clause purposes. 540 U.S. 712, 719 (2004). This argument is a distraction from the core challenge to Missouri's status based discrimination

against religion. Questions of direct or indirect funding are outdated even within proper Establishment Clause cases. Furthermore, the unique considerations of government funding for religious schools cannot be readily applied to a general government aid program, as this case features, where there is an admitted lack of any serious risk of the government action establishing a state religion.

The ERLC is concerned not only with the unjustified treatment of Trinity Lutheran Church in this case but also with the overall trend of churches and religious actors being excluded from participating in government programs. This disturbing trend cuts against the values undergirding the Free Exercise, Establishment, and Equal Protection Clauses, which protect religion from being treated with hostility. Missouri's express discrimination against religion should be declared unconstitutional.

ARGUMENT

I. The difference between direct and indirect funding cannot save Missouri's targeted exclusion of Trinity Lutheran Church from a neutral and secular aid program.

Missouri's Playground Scrap Tire Material Grants program has been applied to exclude The Learning Center operated by Trinity Lutheran Church—or any other church or childcare facility connected with a church—purely because of religious status. Missouri highlights how the grant funding would have gone directly to the daycare being run by a church as one reason the exclusion withstands

constitutional scrutiny. According to Missouri, the "decision regarding who would receive the state funds here was a governmental one." Opp. to Cert. at 4.

The Eighth Circuit majority, too, played up the funding path as a reason the religious exclusion was justified. *Trinity Lutheran Church of Columbia v. Pauley*, 788 F.3d 779, 784 (8th Cir. 2015). The Eighth Circuit noted the challenged program would "provide public grant money directly to a church" and, thus, "in this case there is no break in the link." *Id.* at 784, 785. This was deemed important because "In *Locke*, 'the link between government funds and religious training [was] broken by the independent and private choice of [scholarship] recipients.' " *Id.* at 785 (citing 540 U.S. at 719). This argument is a red herring.

While the path of government funds has featured prominently in this Court's many Establishment Clause cases challenging government support for religious schools, it has never been used to justify a targeted exclusion of religious applications from a program of general, secular government aid. Exclusion of religious actors from public life, as happened to The Learning Center, should not be given a pass merely because the government plays the role of awarding funds to applicants without an intermediary. The distinction between direct or indirect funding has no purchase in this case. If anything, the path of government funding should be limited to Establishment Clause challenges of government funding of religious education; not government recycling grants to improve child safety on playgrounds.

A. The Establishment Clause considerations of direct or indirect funding does not justify excluding religious actors from government aid.

Reliance on the mechanism for distributing government aid is particularly inappropriate here where Missouri (and the Eighth Circuit) make no argument that it would violate the Establishment Clause to permit The Learning Center to receive a scrap tire recycling program grant. *See Trinity Lutheran Church of Columbia*, 788 F.3d at 784 (noting "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause.").

As an initial matter, the lack of any "break in the link" of funding as noted by the court below simply does not apply. *Id.* at 785. There is no claimed Establishment Clause bar to the neutral and secular aid program at issue. Regardless, the source of funding should not drive any determination of the issues in this case.

1. Consideration of direct or indirect funding should be limited to Establishment Clause challenges in the context of education.

The distinction between direct and indirect funding has a shaky foundation that has largely been displaced by considerations of the independent and private choice of individuals as a means of preventing religious indoctrination in schools from being attributed to the government. To be sure, this Court has frequently meted the bounds of government

funding or support for religious education. In those cases there are special concerns about "whether governmental aid to religious schools results in governmental indoctrination" which is "ultimately a question [of] whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality).[2]

Under the Establishment Clause neutrality is the solution to the problem of government-attributed religious indoctrination. The principle of neutrality undermines any potential for linking religious instruction to the government since "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *Id.* at 809. Government funding that is "indirect" is better understood as government aid flowing "as a result of the genuinely independent and private choice of individuals," which fosters true neutrality and defeats any charge of establishing religion. *Id.* at 810; *see also Agostini v. Felton*, 521 U.S. 203, 226 (1997).

In this context of Establishment Clause concerns with the government being held responsible for religious indoctrination, courts have occasionally spoke of 'breaking the link' of government funds, often through private, independent choice. *Locke v. Davey* thus cited a string of school aid Establishment Clause

---

[2] While a plurality opinion, *Mitchell* represents this Court's most exhaustive and helpful review of the Establishment Clause challenges to religious education support.

cases as supporting the 'break in the link' concept. *See Locke*, 540 U.S. at 719 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 13–14 (1993); *Witters v. Wash. Dept. of Servs. for Blind*, 474 U.S. 481, 487 (1986); *Mueller v. Allen*, 463 U.S. 388, 399–400 (1983)); *see also Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995) (collecting cases).

Zelman, *Zobrest*, *Witters*, and *Mueller* are all Establishment Clause cases involving religious schools. None involve a general government aid program as prosaic as converting recycled tires to playground surfaces. The same line of cases, with the addition of *Agostini* (another Establishment Clause education case) served as the basis of *Mitchell*'s discussion of the principle of neutrality operating through independent and private choice. 530 U.S. at 810–11. None of these cases bear a resemblance to the neutral, secular aid program at issue here.

- *Agostini* was a challenge to Title I funds being used for teachers to provide services, for a defined class of students, directly at private, religious schools. 521 U.S. at 210–11.

- *Zobrest* involved a sign language interpreter, supported by government funds, working at a Catholic School and interpreting classes including Catholic doctrine. 509 U.S. at 4.

- *Witters* involved aid for a tuition grant for a blind student to attend a Christian college for studies, even study to be a missionary. 474 U.S. at 483.

- *Mueller* was a challenge to an education expense tax deduction used by many individuals to offset tuition to attend religious schools. 463 U.S. at 391–92.

The tradition of relying on free and independent choice to prevent government aid from creating an Establishment Clause concern has continued after *Mitchell*. In *Zelman v. Simmons-Harris* this Court approved Cleveland's voucher program, noting "*Mueller*, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." 536 U.S. 639, 652 (2002). The Court found the voucher program "entirely neutral with respect to religion" because it permits "individuals to exercise genuine choice among options public and private, secular and religious." *Id.* at 662. The program complied with the Establishment Clause.

The role of free and independent choice in directing government aid (making it indirect) has been repeatedly relied on in the unique context of Establishment Clause challenges to government aid programs supporting religious education—not

general and secular government aid programs as challenged here.

2. *Even for Establishment Clause challenges, breaking the link of direct government funding is not required.*

The role of private and independent choice in mediating government funding for religious education endeavors should not be over-stated. While private and independent choice certainly diminishes or defeats any unconstitutional establishment of religion, it is by no means a necessary condition for government aid of religious education to stand. While a great many of this Court's Establishment Clause cases involving education have relied upon the role of free and independent choice, it has never been deemed a requirement. For instance, the Court has also upheld a number of programs where aid was distributed directly to religious organizations without the intermediary role of private choice.

- *Committee for Public Education & Religious Liberty v. Regan* upheld a state reimbursement scheme for schools administering state required testing, for both secular and religious schools. 444 U.S. 646, 656–59, 1 (1980).

- *Roemer v. Board of Public Works of Maryland* upheld a grant program that allowed grants, based on number of full-time students, to be given to both secular and religious institutions of higher education. According to the Court, "religious institutions need not be quarantined from public benefits that are neutrally

available to all." 426 U.S. 736, 740–43, 746 (1976).

- *Hunt v. McNair* upheld a state law providing for bond financing for education facilities, including both secular and religious institutions of higher education. 413 U.S. 734, 736, 744 (1973).

Thus, the break in the "link" mentioned in *Locke* is not a requirement even in cases under the Establishment Clause, even involving aid to religious schools. *See also Trinity Lutheran Church of Columbia*, 788 F.3d at 791 (Gruender, J., dissenting) ("*Locke* did not leave states with unfettered discretion to exclude the religious from generally available public benefits.").

B. Diminished Establishment Clause concerns from scrap tire playground resurfacing alleviate any need to distinguish direct from indirect aid.

The importance of tracing the path of government funding in the Establishment Clause context is open to debate. *Compare Mitchell*, 530 U.S. at 815–16 (calling into question "the distinction between direct and indirect aid"), *with School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 394–95 (1985), (relying on distinction between direct and indirect aid), *overruled on other grounds by*, *Agostini*, 521 U.S. at 218. Some commenters and cases prefer to speak of all government funding in the dichotomy of direct or indirect funding while others prefer to speak of the role of private and independent choice defeating any

attribution of religious indoctrination to the government. That question need not be addressed to resolve this case. Direct or indirect funding of religious education, like the role of genuinely private and independent choice, works to allay Establishment Clause concerns with government subsidization of religion. *See Mitchell*, 530 U.S. at 815–16.

Missouri's targeted exclusion of religion cannot be justified by pointing to the government's concerns that a challenged action might violate the Establishment Clause because the grant lacks a "break in the link" from the government to the recipient, The Learning Center. Its reliance on the Missouri Constitution's exclusionary provision must conform to the U.S. Constitution's Free Exercise and Equal Protection Clauses. And the Missouri Constitution makes no reliance on the direct or indirect nature of funding, as it expressly prohibits both aid to a church either "directly or indirectly." *See* Mo. Const. art. I, § 7 ("no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion…").

In addition to the Establishment Clause doctrine not applying to Trinity Lutheran's claims, the line of cases which have featured the distinction between direct or indirect funding come from challenges to government programs with palpably higher risk under the Court's criteria of establishing a religion or otherwise entangling the government with activities that are "essentially religious endeavor." *Locke*, 540 U.S. at 721. By contrast, this case involves a scrap tire recycling program and the resurfacing of playgrounds. Whatever the wisdom of such a grant

program, it cannot seriously be said to risk violating any of the Court's Establishment Clause concerns. A playground surface at The Learning Center cannot be distinguished from a playground surface at any other daycare or public school.

Consider other hypothetical government aid programs that focus on either benefiting the environment through recycling, or by improving child safety (both prominent government purposes behind the scrap tire program). Would it ever establish a religion to include religious schools in an otherwise generally available recycling program? Surely picking up a recycling bin at The Learning Center, using governing funding, just as the government could do so for other businesses and schools, would never be considered a risk of establishing a state religion. Likewise, a hypothetical government program providing daycares with subsidies for car seats which improved safety features would, if given to The Learning Center alongside the myriad of other daycares in Missouri, never seriously be confused with government activity that rises to the level of establishing a religion.

This is a far cry from government funds being used for an interpreter who provides sign language interpretation of a Catholic Doctrine class, *Zobrest*, 509 U.S. at 4, nor of government funds being used for general tuition at religious school, *Zelman*, 536 U.S. at 652. Nor can this case be compared to government aid for blind students who choose to attend a Christian college and who are free to study to be a missionary, *Witters*, 474 U.S. at 483. Whether right or wrong, these cases all involved activity arguably

rising to the level of an established religion, under the Court's traditional concerns. The same cannot be said of The Learning Center's ability to patriciate the scrap tire recycling program.

The level of government involvement with religious activity relates to the argument that Missouri's "direct" grant program should be permitted to exclude religion because it was not sufficiently "indirect" or mediated by free and independent choice in the same way as school vouchers were in *Zelman*. There is no serious Establishment Clause concern or risks from including The Learning Center in the scrap tire recycling grant program. Thus, the flow of government funding through the grant program is legally insignificant in justifying the targeted exclusion of religion. Because there is no proper Establishment Clause objection to Missouri's scrap tire recycling program, the question becomes one of reviewing Missouri's express exclusion of The Learning Center purely because of its religious status.

Allowing the Learning Center to participate in a recycled tire grant program falls well short of the established religion risks of the education line of cases. Allowing churches to participate in secular government aid programs like the Missouri scrap tire program is far closer to general government programs such as fire and sewer services than it is to the educational indoctrination concerns or government funding of essentially religious endeavor. The path of funding provides no defense for Missouri's targeted exclusion of religion.

II. Churches should be allowed to participate in government programs on equal footing with other civic organizations.

America has always enjoyed the presence of churches in civic life. Our nation was founded with the prevalent belief that religion provides a moral foundation necessary for successful republican self-government. The mediating role of churches in society is no less valuable today than at the time of the founding.

The commitment to religious liberty as enshrined in the First Amendment provides freedom to every church to pursue its own spiritual ends. Those ends frequently include valuable contributions to the community, including social services, education, and other acts of mutual aid and benevolence to citizens in need. To so operate, churches must be free from undue interference from civic powers to pursue ministry in its many forms.

The uniquely American experience with religious pluralism and the protection of free exercise of religion means most churches do not want government-sponsored or government-established religion. All too often government-sponsored religion interferes with a church's ability to live out a religious faith free from government meddling.

Religious views, along with any other sincere views, must be welcomed on equal terms in civil society. Indeed, "the pluralist model is based on the accommodation position ... government accommodation of all people's rights to express, or refrain from expressing, religious convictions and religious beliefs." Richard Land, *The Divided States of*

America 76 (2011). Embracing a pluralistic society with many competing religious faiths will mean "no one is penalized for his or her views; neither those with religiously informed moral values, nor those with religion-free convictions." *Id.* at 174.

In James Madison's 1785 *Memorial and Remonstrance Against Religious Assessments*, the influential Founding Father opposed a bill to provide for established government religious teachers on two grounds. First, he opposed it on the basis of conscience because the "religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." Second, he opposed it on the grounds of equality as "the Bill violates that equality which ought to be the basis of every law ... all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights."[3]

As this Court put it more recently, "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). Indeed, the "design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Id.*

---

[3]Available at http://founders.archives.gov/documents/Madison/01-08-02-0163

The freedom of the religious sphere to operate without government coercion does not, however, necessitate a clinically secular state where religious actors are kept from public life. Government can, and should, accommodate religiously-neutral actors in government programs, allowing participation on an equal basis for religious and non-religious constituents.

The alternative, excluding church and religion from otherwise neutral government programs, would not fulfill the "benevolent neutrality" the Court has long embraced whereby "State power is no more to be used so as to handicap religions, than it is to favor them." *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 669 (1970) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). A broad exclusion of religion is not neutral, let alone benevolent.

The Ethics & Religious Liberty Commission defends the right of churches throughout the country to enjoy religious freedom. It is concerned that this Court's Religion Clause precedent is being misunderstood and misapplied by lower courts to sanction discrimination against churches.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

MICHAEL LEE FRANCISCO
Counsel of Record
MRDLAW
3301 West Clyde Place
Denver, CO 80211
(303) 335-7843
michael.francisco@mrd.law

April 21, 2016